Supreme Court, U.S.
FILED
OCT 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-152

In The

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

v.

NADINE NELSON, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED

1.

Whether or not the decisions of the lower state tribunals establish adequate and independent state grounds thereby precluding review by this most Honorable Court.

2.

Whether the four-part analysis applicable to commercial speech cases established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), as later interpreted in *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), was misapplied by the Fifth District Court of Appeals through the use of a least restrictive-means standard?

PARTIES TO THE PROCEEDINGS

Petitioner

The State of Florida, Volusia County (a political subdivision thereof), appellant below.

Respondents

Nadine Nelson, Sharon Rongstad, Sharon Bertalli, Albert Livingston, Cynthia Ann Cerr, Margo Madden, Joseph McGreevy, and Paula Leggett, appellees below.

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The respondents respectfully request that this court decline to issue a writ of certiorari to review the decision of the Fifth District Court of Appeal rendered in this cause on October 19, 1989.

OPINIONS BELOW

The unpublished order of the trial court was rendered on February 28, 1989. A copy of the order is included in the appendix.

The October 19, 1989, opinion of the Fifth District Court of Appeal, *State v. Nelson*, 533 So.2d 195 (Fla. 5th

DCA 1989), is the only published opinion issued by a state court. Copies of that opinion, the order denying the consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court, as well as the order in which the Florida Supreme Court declined to accept discretionary jurisdiction are included in the appendix.

JURISDICTIONAL STATEMENT

The decision of the Fifth District Court of Appeal was rendered on October 19, 1989. Consolidated motions for rehearing, rehearing *en banc*, and for certification of the issue to the Florida Supreme Court were denied on December 7, 1989. The Florida Supreme Court denied review on April 17, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The ordinance which was held unconstitutional provides:

Section 4.08 Soliciting and Canvassing Prohibited.

(a) *By other than licensed concessionaires of goods and services for use or consumption on beach.* No person other than a concessionaire licensed under the provisions of Section 8 of this Code shall solicit or canvass for the sale or rental of merchandise, services, goods or property of any kind or character intended for use or consumption on the beach.

(b) *By licensed concessionaires.* No licensed concessionaire shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character except from within 10 feet of his licensed premises or vehicle.

(c) *By any person of goods and services for use or consumption off beach.* No person shall solicit or canvass for the sale or rental of any merchandise, services, goods or property of any kind or character to be delivered or performed off the beach.

Volusia County Ordinance 87-36, § 4.08.

STATEMENT OF THE CASE

Volusia County, a political subdivision of the state of Florida, enacted an ordinance that eliminated commercial solicitation on its public beaches and allows for commercial free speech to that related to the provision of goods and services which were to be used on the beaches. Stated otherwise, commercial free speech for the sale on the beaches of goods or services which were to be used off of the beaches was prohibited under the ordinance.

The respondents were time-share salespersons at the time they were charged with violating the county ordinance. Their cases were consolidated by the trial court. Their counsel filed a motion seeking a declaration by the trial court that the ordinance was unconstitutional. A hearing was held on the motion, at which the defense argued that the ordinance was facially invalid under the First Amendment. The trial court rendered an order declaring the ordinance to be facially unconstitutional under *both* the state and federal constitutions: The opinion of that court provides extensive reference in that the said opinion states, "taking a lesson from the Supreme Court of Florida in the above-cited case, it would be redundant for this court to cite the hundreds of cases that followed *State ex rel. Wilson et al v. Russell,* 1 So.2d 569 (Fla. S.Ct. 1941).

On appeal the state and county argued that the ordinance did not violate the First Amendment rights of the defendants. It was argued that the restrictions represented a valid exercise of the police power. The defense argued to the contrary, and the Fifth District Court of Appeal agreed. The opinion cited directly a provision of the state constitution, through which "the scope of the protection accorded to freedom of expression in Florida under article I, section 4, is the same as is required under the First Amendment." *Department of Education v. Lewis,* 416 So.2d 445, 461 (Fla. 1982) (citation omitted). The decision below turned on the court's holding that:

> Under the four part analysis of governmental regulation of commercial speech enunciated by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341

> (1980), the complete ban of solicitation or canvassing for sale or rental of off-beach goods or services contained in section 4.08 must fail. The complete suppression, under the police power, of commercial speech relating to the solicitation for off-beach goods and services is more extensive than necessary to further any alleged governmental interest in promoting the public welfare by protecting the privacy and aesthetic sensibilities of members of the public who are on the beach.

State v. Nelson, 553 So.2d 195, 197 (Fla. 5th DCA 1989).

The state sought rehearing, pursuant to Florida Rule of Appellate Procedure 9.330, in part on the ground that the appellate court had overlooked or misapprehended the *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), analysis as interpreted in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The motion was denied without further discussion.

The state petitioned the Florida Supreme Court to exercise its discretionary jurisdiction in order to review the holding of the district court. The merits were never reached because the state supreme court rightfully declined to accept jurisdiction.

ARGUMENT

THE LOWER STATE TRIBUNALS HAVE DETERMINED THAT THE SUBJECT ORDINANCE IS UNCONSTITUTIONAL AND IN VIOLATION OF THE STATE OF FLORIDA CONSTITUTION. THERE IS NO CONFLICT OF DECISIONS AND THIS COURT SHOULD NOT GRANT THE GOVERNMENT'S REQUEST FOR CERTIORARI BECAUSE THE SUBJECT STATE DECISIONS ARE WELL FOUNDED IN STATE CONSTITUTIONAL LAW. THIS COURT SHOULD NOT VACATE THE JUDGMENT OF THE STATE TRIBUNALS IN ORDER TO GIVE AN UNSOLICITED OPPORTUNITY TO HAVE THE STATE COURTS REANALYZE THEIR OWN LAW. ALTERNATIVELY, THIS HONORABLE COURT SHOULD, PRIOR TO ISSUING ANY OPINIONS REGARDING THE FEDERAL LAW VIS-A-VIS THE FLORIDA CONSTITUTION, SHOULD REMAND THIS MATTER TO THE STATE COURTS FOR A RESOLUTION OF STATE-LAW DISPOSITION.

IMPORTANCE OF FEDERAL LAW QUESTION

That the importance of federal law question is nonexistent. The final judgment reflects a decision founded in both the 1st, 5th and 14th Amendment to the United States Constitution and Article 1, Section 4 of the Florida Constitution. The entire thrust of the decision of the initial lower tribunal reflects that Judge Josephson relied heavily upon the Florida Supreme Court decision of *Wilson et al. v. Russell, supra.* The court specifically stated in the final judgment that it was "redundant" to cite the hundreds of cases that followed the *Wilson* case (supra).

The initial lower tribunal's decision rests on an adequate and independent state ground. Therefore, this Most Honorable Court should not accept review of the judgment of the state court, *Herb v. Pitcairn,* 324 U.S. 117, 128,

89 L.Ed. 789, 65 S.Ct. 459 (1945). Accord, *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965); *Honeyman v. Hanan*, 300 U.S. 14, 18-19, 81 L.Ed. 476, 57 S.Ct. 350 (1937); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); *Lynch v. New York* ex rel. *Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); *McCoy v. Shaw*, 277 U.S. 302, 72 L.Ed. 891, 48 S.Ct. 519 (1928); *Petrie v. Nampa and Meridian Irrigation District*, 248 U.S. 154, 157, 63 L.Ed. 178, 39 S.Ct. 25 (1918); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 163-166, 61 L.Ed. 644, 37 S.Ct. 318 (1917); *Eustis v. Bolles*, 150 U.S. 361 (1893); *Murdock v. Memphis*, 20 Wall 590, 22 L.Ed. 429 (1875). The initial tribunal unambiguously held that the statute violates Florida's State Constitution. Therefore, this court is without power or constitutional authority to review the subject final judgment issued by the Honorable Norton Josephson. It is manifestly clear that the decision of the initial lower tribunal is not founded, as a sole basis for the decision, on the federal constitution. This court has repeatedly been alerted to opportunities to avoid federal constitutional issues by means of a state-law disposition, E.g., *Mills v. Rogers*, 457 U.S. 291, 302-306, 73 L.Ed.2d 16, 102 S.Ct. 2442 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 445 U.S. 283, 294-295, 71 L.Ed.2d 152, 102 S.Ct. 1070 (1982); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 53 L.Ed. 753, 29 S.Ct. 451 (1909). See generally *Hagans v. Lavine*, 415 U.S. 528, 546-547, and nn 12-13, 39 L.Ed.2d 577, 94 S.Ct. 1372 (1974).

The petitioner certainly has the burden of establishing jurisdiction for this Most Honorable Court. Mere speculation has proved inadequate in past attempts to

establish jurisdiction with this court. E.g., *Durley v. Mayo*, 351 U.S. 277, 285, 100 L.Ed. 1178, 76 S.Ct. 806 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1952); *Lynch v. New York* ex rel. *Pierson*, supra; *Johnson v. Risk*, 137 U.S. 300, 34 L.Ed. 683, 11 S.Ct. 111 (1890).

Finally, even when a state tribunal misconceives federal law, this court cannot and should not vacate that judgment merely to give an unsolicited opportunity for re-analyzation of its own law, *Herb v. Pitcairn*, supra, at 126, 89 L.Ed. 789, 65 S.Ct. 459. Accord, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-123, 68 L.Ed.2d 706, 101 S.Ct. 2211 (1981); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569, 91 L.Ed. 1666, 67 S.Ct. 1409 (1947); *United States v. Hastings*, 296 U.S. 188, 193, 80 L.Ed. 148, 56 S.Ct. 218 (1935).

Unquestionably, the respondents accurately informed the public about lawful activity and the commercial speech was non-deceptive in nature. The only illegality that attached to the solicitation forbidden by the subject ordinance was simply because of the passage and enactment of the subject ordinance itself. No other illegality attaches to the conduct of the respondents. The subject ordinance does not promote a substantial governmental interest, and argued alternatively, other means of regulation could be achieved which would be less intrusive upon the petitioner's fundamental right to exercise commercial free speech. In short, the four part analysis, as enunciated under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), and further refined in *Board of Trustees of State University of N.Y. v. Fox*, ___ U.S.

___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) was properly applied in conjunction with Florida law.

CONCLUSION

The petition for writ of certiorari should not be granted because the lower tribunals issued opinions based upon adequate and independent state grounds. Further, no conflict exists with applicable decision of this court.

Respectfully submitted,

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